STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SYLVAN DISTRICT EDUCATORS ASSOCIATION, CTA/NEA, Charging Party,	)	Case No. S-CE-1366
v.	)	PERB Decision No. 919
SYLVAN UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	)	January 7, 1992

Appearances: California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Sylvan District Educators Association, CTA/NEA; Pinnell & Kingsley by Joyce E. Earl, Attorney, for Sylvan Union Elementary School District.

Before Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Sylvan District Educators Association, CTA/NEA (Association) from the proposed decision of a PERB administrative law judge (ALJ) which dismissed the Association's complaint alleging that the Sylvan Union Elementary School District (District) violated the Educational Employment Relations Act (EERA or Act) section 3543.5(a), (b) and (c)[1] by unilaterally eliminating the position of learning

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:

specialist without affording the Association notice and an opportunity to bargain the effects of that decision. Specifically, the ALJ found that the Association waived its right to bargain this issue when it failed to request to discuss or negotiate the effects of the decision once it had received notice that the decision had been made.

PROCEDURAL HISTORY

The charge originally alleged that the District engaged in a unilateral change when it failed to notify the Association and allow it ample time to negotiate both the decision to eliminate the learning specialist and the effects of that decision. During the investigation, the Association's allegations regarding the decision, as opposed to the effects thereof, were withdrawn. Therefore, the only violation alleged in the complaint is that the District violated the Act by failing to notify and bargain regarding the effects of its decision.

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

FINDINGS OF FACT

The Association is an employee organization and the District is a public school employer as those terms are defined in the EERA. The Association is the exclusive representative of a unit of certificated employees. The District and the Association are parties to a collective bargaining contract which was in effect at all times relevant hereto, namely July 1, 1988, through June 30, 1991. In that contract, the position of learning specialist is specifically recognized as part of the bargaining unit and, incumbents receive a stipend for their services.

In a separate document approved by the District's governing board in June 1986, the position of learning specialist is described as follows:

> Provides instruction to students on a regular basis in units of work; assists in providing an educational program for students; serves as a curriculum/instructional leader at the site level.

The document lists the major duties of the position as providing instruction as needed, coordinating and assessing students, maintaining records, providing resources, sharing in sponsorship and supervision of student activities, and performing other duties as assigned.

During the hearing, employees who had actually served in the position of learning specialist indicated that they were responsible for a number of activities which might vary depending upon the specialists and the school site. Some of the activities were performed exclusively by the learning specialist, some in

conjunction with other personnel, in and out of the unit. The activities included supervising the student council, speech and spelling contests, testing programs, GATE screening, awards and assemblies, a talent show and the District's self-esteem program.

Sometime in January or February of 1990, the District determined that budget constraints might require the reduction in certain services or personnel for the 1990-1991 school year. The management team, known as the cabinet, focused upon the position of learning specialist. Reluctant to take any definitive action until more financial and budget information was available, no action was taken at that time. By May, the cabinet, comprised of the Superintendent, Dr. Michael Sibitz (Sibitz), the Business Manager, Michael Dodge, the Assistant Superintendent for Instruction, Doris Causey, and the Personnel Director, Jeff Lovell (Lovell), had reached a decision to recommend the elimination of the learning specialist position. On May 22, 1990, the District's governing board approved the recommendation in executive session but did not report the matter out to a public meeting at that time. The board did not take public action until June 7, 1990.

At no time prior to June 5, 1990, were the Association or the concerned employees given notice of the District's contemplated action, or the decision made in executive session. The District provided no colorable explanation for its failure to give the Association notice; the person who apparently decided when to give notice, and to whom, Dr. Sibitz, was not called as a

witness. In any event, Lovell claimed that he did not believe notice was required as action was being taken pursuant to the involuntary transfer section of the contract and Education Code section 44955, which pertains to a reduction in force.[2]

On or about June 5, the superintendent and Lovell travelled to each school site with the purpose of advising the learning specialists that their positions were being eliminated effective the end of the school year. The teachers in question were told to consider transfer options immediately. Lovell did not have direct contact with Cassandra Sparks (Sparks), a learning specialist at the Stockard-Coffee school site. She received notice through Martha Gausman, the principal at that school on the same date. No teacher was given notice of layoff or termination.

Prior to the action complained of herein, the District employed six (6) learning specialists, one at each of its elementary schools. Sparks was a learning specialist at Stockard-Coffee for three years at the time of the action complained of herein. She was transferred to a 5th grade classroom teaching assignment at the same school. As a result of her transfer, she lost her stipend and since she had taught at a

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[2]Daniel Savage (Savage), President of the Association, testified that Gary Vance, President of the governing board, told him that the District, which had contemplated elimination of learning specialists as early as February 1990, refrained from giving earlier notice for fear the news would have a negative impact on the learning specialists' performance of their job. Similar information had been communicated to Savage by Jeff Lovell, the District's personnel director.

school on a year-round schedule, she worked on an extended year contract and lost 20 days of compensation. A stipend and 20 days of per diem compensation were also lost by David Holtz, the learning specialist at the Coleman Brown School site, and Nancy Kramling, the learning specialist at Sylvan School. Candace Brody was the learning specialist at Sherwood School and Ann Rapp was the learning specialist at Standiford. They each received a stipend for their learning specialist assignment and one for serving as assistant to the principal as well. The record is not clear as to whether they automatically lost the assistant principal assignment when they were transferred out of their positions as learning specialists. Barbara Bert was the learning specialist at the Woodrow School site; she lost her stipend.

Although the record is not entirely clear, each of the above-named teachers did transfer to a classroom teaching assignment fairly high on his/her list of preferred assignments. There is no dispute, however, that most of the duties the learning specialists had performed during the 1989-1990 school year were not eliminated but rather were transferred to other teaching personnel, classified staff, volunteers, or administrators. In at least one school, supplemental teachers were hired, using school improvement program funds, to perform some of the tasks hitherto performed by learning specialists. Some specific duties, such as the administration of a particular test, were not transferred because a different test instrument

was being used or a program was being organized somewhat differently.

Testimony showed that before learning specialists were eliminated, they coordinated extra curricular activities which **the** District deemed important for the development of elementary school children. In addition, the learning specialists gathered reading materials, administered tests, and assisted in student discipline, thereby relieving the teachers of that responsibility. The witnesses who were classroom teachers before and after the elimination of learning specialists credibly testified that their workweek increased an average of 60 to 90 minutes after the learning specialist was no longer available to provide assistance. No additional compensation was provided as a result of the workload increase.

ASSOCIATION'S EXCEPTIONS

The Association excepts to the proposed decision, arguing **that** it was never given notice of the decision to eliminate the learning specialists, because implementation was actually carried out on June 5, 1990. The Association claims the duty to request negotiations never arose because the Association did not have notice prior to the date of implementation, i.e., June 5. The Association further contends that the employer never raised the affirmative defense of wavier and an affirmative defense must be **raised** in the answer or it is waived. (Beverly Hills Unified School District (1990) PERB Decision;No. 789; Brawley Union High School District (1982) PERB Decision No. 266; Walnut Valley

Unified School District (1983) PERB Decision No. 289; Morgan Hill Unified School District (1985) PERB Decision No. 554.)

DISTRICT'S RESPONSE TO EXCEPTIONS

The District's response supports affirmance of the proposed decision. The District claims that the second affirmative defense raised in its answer incorporated the waiver by inaction defense. The District's second affirmative defense states, "Respondent was required to take the actions complained of on the basis of law." With regard to the affirmative defense issue, the District argues that PERB Regulation 32645[3] grants the Board discretion to disregard this error, because the Association would suffer no prejudice as a result thereof. The District goes on to state that the Association has never claimed it was unable to produce a key witness.

The District further contends the Association had actual knowledge of the decision to eliminate the position of learning specialist on June 5, 1990. The District agrees with the ALJ that June 5 was the date of notice, not implementation. The District contends actual notice was received when personnel director Lovell met with or spoke over the telephone to each of the learning specialists. It is claimed that the process was not

[3]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32645 states:

> Non-prejudicial Error. The Board may disregard any error or defect in the original or amended charge, complaint, answer or other pleading which does not affect the substantial rights of the parties.

completed until the school year began for employees on July 9, 1990, subsequent to the governing board adoption of the tentative budget in June, 1990. The District claims the Association was required to make a demand to bargain when it received actual notice. (Mt. Diablo Unified School District (1983) PERB Decision No. 373.)

DISCUSSION

The Association's exception that waiver by inaction is an affirmative defense, which the District waived by failing to raise in its answer, presents a novel situation. In the present case, the Association, for an unknown reason, withdrew the allegation of unilateral change with regard to the decision to eliminate learning specialists. The complaint alleges only that the District unilaterally changed the policy of employing learning specialists "without prior notice and without having afforded Charging Party an opportunity to negotiate the effects of the change in policy". The Board, therefore, has no jurisdiction to determine whether the decision itself was negotiable.

As a general rule, in a unilateral change case charging party must show that a change in policy was made without first affording the charging party notice and an opportunity to bargain regarding the issue. Once it can be shown that notice was given, if the charging party fails to request to bargain regarding the issue, that is considered a waiver by inaction. In Morgan Hill Unified School District (1985) PERB Decision No. 554, footnote

13, the Board held that waiver is an affirmative defense which is itself waived if not raised by the respondent, citing Walnut Valley Unified School District (1983) PERB Decision No. 289; Brawley Union High School District (1982) PERB Decision No. 266. In addition, PERB Regulation 32644(b)(6) requires affirmative defenses be contained in a party's answer.[4] See also Beverly Hills Unified School District (1990) PERB Decision No. 789, p. 14.

Hence, the District's claim of waiver on the part of the Association, and the Association's contention that the District waived that affirmative defense by its failure to raise it in its answer, is understandable. Nonetheless, the sole issue before the Board in this case concerns the allegation that the District failed to afford the Association notice and an opportunity to bargain the effects of its decision. Therefore, the Board must address the issue before it, applying the relevant legal precepts.

When considering an effects bargaining allegation of unilateral change, the charging party must show, as part of its prima facie case, that it made a request to bargain the effects of the decision. Waiver is no longer an affirmative defense. In Allan Hancock Community College District (1989) PERB Decision

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[4]PERB Regulation 32644(b)(6) states:

> (b) The answer shall be in writing, signed by the party or its agent and contain the following information:
>
> (6) A statement of any affirmative defense;

No. 768, Dismissal Letter, p. 2, the Board summarily affirmed a Board agent's dismissal of an allegation of unilateral change for failure to state a prima facie case, stating:

> In Newman-Crows Landing Unified School District (1982) PERB Decision No. 223, the Board held that an exclusive representative alleging that the employer refused to bargain "effects" must allege that it signified to the employer its desire to negotiate the effects of the employer's decision in order to set forth a violation of EERA section 3543.5(c). The request may consist of a "general notice of interest in the effects of the . . . decision".
> (Emphasis added.)

An employer still has a "duty to provide notice and an opportunity to negotiate the effects of its decision . . . when the employer reaches a firm decision." (Mt. Diablo Unified School District (1984) PERB Decision No. 373b, p. 3, emphasis deleted.) Stated otherwise, an employer has a duty to afford the Association "notice and a reasonable opportunity to negotiate prior to taking action which affects matters within the scope of representation". (Mt. Diablo Unified School District (1983) PERB Decision No. 373, p. 20.) However, where an Association receives actual notice of a decision, the effects of which it believes to be negotiable, the employer's "failure to give formal notice is of no legal import". (Regents of the University of California (1987) PERB Decision No. 640-H, p. 22.)

With regard to the adequacy of the request, the Board has **held** that, while "it is not essential that a request to negotiate be specific or made in a particular form" it must "adequately signif[y] a desire to negotiate on a subject within the scope of

bargaining." (Newman-Crows Landing Unified School District. supra, pp. 7-8.) In that case, the Board also held that a request is insufficient to state a prima facie case of failure to bargain effects where the request fails to express any desire to negotiate the effects of a decision, as opposed to the decision itself. (Id., pp. 8 and 10; Allan Hancock Community College District (1989) PERB Decision No. 768, Dismissal Letter, p. 2.)

Regarding the specificity of the request, although virtually all the PERB cases cite Newman-Crows Landing Unified School District, supra, for the proposition that a sufficient request may be a showing of general interest,, and no particular form or verbiage is required, the requests which the cases have found to be sufficient have been quite specific. In Calistoga Joint Unified School District (1989) PERB Decision No. 744, p. 10, the Board held "a clear demand to meet and discuss a matter, even without a specific request to negotiate" is sufficient to raise the duty to bargain. However, in that case, the Association made both written and oral demands which clearly stated its demand to negotiate both the decision and effects of issues in question. (Id., pp. 3 and 9-10.)

In Kern Community College District (1983) PERB Decision No. 337, the Association stated in a letter to the District that the issue at hand was within the scope of bargaining, and that the employer must give the Association "notice and the opportunity to negotiate over the effects of the decision." (Id., p. 5.) Later, the Association president gave a written

presentation in which he alleged the District refused "to negotiate the effects" of the relevant issue. The Board found these communications from the Association to the District to be "sufficient to put the District on notice that the Association desired to hold negotiations not merely on the subject of the . . . decision itself, but on the negotiable effects of that decision." In fact, when the District claimed that it was confused as to the object of the Association's various requests for negotiations, the Board held that in this case if the District were confused "the duty to bargain in good faith behooved it as a minimum to seek clarification of the Association's position." fid., p. 6.)

Similarly, where the Association "formally demanded to negotiate 'any and all impacts upon members of [their] bargaining unit in any and all mandatory subjects for negotiation resulting from [the District's] decisions of recent weeks,'" the Board held that "[s]uch a request was certainly sufficient to place the District on notice that the Association wished to negotiate the effects . . . arising from its decision." (Mt. Diablo Unified School District (1983) PERB Decision No. 373, pp. 21-22.)

The Board, in agreement with the ALJ, finds that, although the District failed to notify the Association of its decision to eliminate the learning specialists, the Association received actual notice of the decision on June 5, 1990. The District's failure to give notice to the Association became a moot point, from a legal standpoint, when it received actual notice on

June 5, 1990. (Regents of the University of California, supra.)

The Association was required, as part of its prima facie case, to show that it made a request to bargain the effects of the decision. (Allan Hancock Community College District, supra, and Newman-Crows Landing Unified School District, supra.) The uncontroverted testimony of Association president Joseph Savage was that he expressed his concern to Gary Vance, president of the School Board, over the handling of the elimination by the District, specifically with regard to the lateness of the notices given and the impact on the specialists' opportunity to reapply for other positions. As a general rule, PERB case law requires that the demand be sufficient to put the other party on notice that the Association desires to bargain, or to meet and discuss, a negotiable subject. (Kern Community College District, supra; Mt. Diablo Unified School District, supra; Calistoga Joint Unified School District, supra.) Furthermore, with regard to effects bargaining cases, the request must adequately signify a desire to negotiate the effects of the decision. (Newman-Crows Landing Unified School District, supra: Allan Hancock Community College District, supra.) In the present case, the Association's request was inadequate to put the District on notice that the Association desired to negotiate over the elimination of the learning specialists, regarding either the decision or the effects thereof.

The Association's claim that the decision was implemented on June 5, 1990, and, therefore, a duty to demand to negotiate never

arose, is rejected. It is found that affected employees were notified of the decision on that date. As stated above, once the Association received actual notice of the decision from its members, it had a duty to demand to bargain the effects thereof.

CONCLUSION

Because a showing of a sufficient demand to bargain is part of the Association's prima facie case, failure to carry its burden in this respect is fatal to its claim, and dismissal of the complaint is appropriate.[5]

ORDER

The complaint in Case No. S-CE-1366 is hereby DISMISSED.

Member Carlyle joined in this Decision.

Chairperson Hesse's dissent begins on page 16.

[5]Because the Association's complaint is being dismissed on other grounds, it is unnecessary to address other defenses raised by the District.

HESSE, Chairperson, dissenting: While I agree with the majority's citation of applicable Public Employment Relations Board (PERB or Board) case law for an effects bargaining case, I dissent from the majority's analysis and ultimate dismissal of the complaint.

The unfair practice charge alleged that the Sylvan Union Elementary School District (District) unilaterally changed a policy without providing notice or an opportunity for the exclusive representative to negotiate the decision to eliminate the position of learning specialist. Subsequently, the Sylvan District Educators Association, CTA/NEA (Association) withdrew the allegation in the unfair practice charge that the District failed to negotiate over the decision to eliminate the position of learning specialist. The PERB General Counsel issued a complaint alleging that the District changed its policy of employing bargaining unit members as learning specialists by eliminating the learning specialist position and reassigning bargaining unit members who had worked in those positions without prior notice and without having afforded the Association an opportunity to negotiate the effects of the change in policy.

As a result of the Association's partial withdrawal, the nature of the case changed from a unilateral change to a refusal or failure to bargain the effects of a decision. In effects bargaining cases, the Board has held that an exclusive representative alleging that the employer refused to bargain effects must allege that it signified to the employer its desire to negotiate the effects of the decision in order to state a

prima facie violation of section 3543.5(a) and (c) of the Educational Employment Relations Act (EERA). (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223; Allan Hancock Community College District (1989) PERB Decision No. 768.) In most effects bargaining cases, the Board has held that **the** decision is nonnegotiable. Therefore, the only issue the exclusive representative has the right to bargain is the effects of that nonnegotiable decision. (See Alum Rock Union Elementary School District (1983) PERB Decision No. 322; Mt. Diablo Unified School District (1983) PERB Decision No. 373.)

With regard to negotiating the effects of a decision, the employer has a duty to negotiate at a meaningful time, usually as soon as the employer makes the decision. In Kern Community College District (1983) PERB Decision No. 372, the Board held that:

> . . . the effects of layoff are within the scope of negotiation, and that an employer is obligated to negotiate those effects upon request. Further, the employer must negotiate over the effects as soon as it decides to lay off, consistent with its duty to negotiate over the effects of a decision at a meaningful time. Newark Unified School District (6/30/82) PERB Decision No. 225. First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705, at p. 2771].
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> fid, at p. 11.)

In the present case, there is no evidence or finding regarding whether the District's decision was negotiable or nonnegotiable. However, regardless of whether the District's decision was negotiable or nonnegotiable, the record reflects

that the District failed to give any meaningful notice to the Association.

In January or February of 1990, the District determined that budget constraints might require the reduction of certain services or personnel, including the position of learning specialist. By May of 1990, the District's management team had reached a decision to recommend the elimination of the learning specialist position. On May 22, 1990, the District's governing board approved the recommendation to eliminate the learning specialist position. On or about June 5, 1990, the District advised the learning specialists that their positions were eliminated effective the end of the school year.[1]

Throughout this decision-making and implementation process, the District admits it did not give the Association notice. The Association received actual notice after the learning specialists had been informed that their positions were eliminated. Since the District never gave the Association notice, and the Association received actual notice only after the decision had been implemented, I conclude that there was no meaningful notice of the District's decision to eliminate the learning specialist position. Accordingly, the District never afforded the Association a reasonable opportunity to negotiate the effects of the District's decision. (See Arvin Union School District (1983) PERB Decision No. 300, p. 11; San Mateo County Community College District (1979) PERB Decision No. 94, p. 22.) As the Association

[1]The 1990-91 school year began on or about July 9, 1990.

did not receive meaningful notice, the obligation to demand to negotiate the effects of the District's decision never arose.

Based on the lack of meaningful notice, I find the District violated section 3543.5(a) and (c) of the EERA when it unilaterally eliminated the learning specialist position and reassigned bargaining unit members who had worked in those positions without meaningful notice and without affording the Association a reasonable opportunity to negotiate the effects of the change in policy.